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No. 98-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CHARLES SIMPSON CHRISTOPHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the approval of state regulators to conduct a private business constitutes a "property" interest such that a scheme to defraud regulators of this interest violates the federal wire fraud statute?

II. Whether this Court's opinion in *McNally v. United States*, 483 U.S. 350 (1987) limiting federal mail fraud prosecutions to schemes to defraud persons of property requires the government to prove that the person allegedly deceived was the person potentially economically injured?

III. Whether the giving of a general instruction on mens rea in a fraud case precludes the defense from obtaining an instruction on good faith reliance upon the advice of counsel?

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OPINIONS BELOW

The opinion of the First Circuit Court of Appeals below is reported as *United States v. Charles S. Christopher*, 142 F.3d 46 (1st Cir. 1998). App. 1a-25a.[1]

JURISDICTION OF THE COURT

The judgment below was entered and filed on April 27, 1998, and rehearing was denied on June 11, 1998. App. 38a. Accordingly this Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. § 1254.

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[1] Citations to the appendices are designated as "App. ___." Designations to the trial transcript are by date and page. Designations to defense exhibits are to "CC __."

STATUTORY PROVISION AT ISSUE

18 U.S.C. § 1343
(wire fraud statute)

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF FACTS

Petitioner Charles S. Christopher was convicted of eleven counts of wire fraud and ten related counts of interstate transportation of fraud proceeds based upon the government's contention that Christopher deceived state insurance regulators in 1988 when a company of which he was President, Resolute Holdings, Inc. ("Resolute"), sought regulatory approval for the acquisition of two insurance companies, Diamond Benefits Life Insurance Company ("Diamond") and American Universal Insurance Company ("American"). App. 2a. According to the prosecution, Christopher deceived state regulators when, during the regulatory approval process, he misrepresented that all liens would be paid prior to the acquisition closing upon the real estate collateral used to secure Resolute's contribution of new capital to the struggling insurance companies. *Id.* Further, the prosecution contended that Resolute's use of monies procured from the insurance companies to pay off these pre-existing liens, and to pay off the purchase price of Diamond, violated promises by Christopher to these state insurance regulators or specific state regulatory orders prohibiting such conduct.

Diamond was domiciled in Arizona and its acquisition by Resolute was subject to the approval of insurance regulators from Arizona and California. App. 2a. American was domiciled in Rhode Island, and its acquisition by Resolute was subject to the approval of Rhode Island insurance regulators. Id. Resolute's plan for the acquisition of Diamond and American insurance companies, as designed, approved, and implemented, called for Resolute to contribute, apart from the purchase prices, more than $100 million in new capital into the two companies in the form of promissory notes which would be secured by substantial real estate holdings. The collateral used to secure the promissory note for the American acquisition included the development properties known as Indian Palms and Heritage Ranch, while the collateral used to secure the promissory note for the Diamond acquisition was known as Indian Springs. July 10, 1995, at 9-10. This collateral was owned by companies which were owned by Resolute's majority shareholder, defendant Wayne Reeder.[2]

The properties which secured these promissory notes were encumbered with certain substantial pre-existing liens. According to the prosecution, Christopher falsely promised the Arizona and Rhode Island insurance regulators that Resolute would have these pre-existing liens paid off in full at the time of its closing on the acquisition of each company. App. 4a. The prosecution contended that these regulators detrimentally relied upon these promises or conditions in order to approve of Resolute's acquisition of Diamond and American. After the May 27, 1988 conditional closing on the American acquisition and the June 14, 1988 closing on the Diamond acquisition, Resolute authorized its new subsidiaries to issue loans in June and July 1988 for the express purpose of paying off these liens.

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[2] Mr. Reeder's trial was severed from petitioner's for medical reasons.

More specifically, Diamond issued a secured and recorded $18 million loan to Hilltop Corporation, a Reeder-related company, for the express and limited purpose of paying off liens. (CC 501). This loan was secured by new real estate collateral known as the Windbrook Country Club, and was guaranteed by Hilltop, a company with a net worth of $34 million. July 10, 1995, at 95, 228-30. Based upon this recorded loan, monies received by Diamond were disbursed as loan proceeds in the latter part of June 1988 to pay off pre-existing liens on properties used to secure the Resolute promissory note for the acquisition of American.

In July 1998, a similar, but smaller, collateralized loan was issued by American to Mydar Corporation, and a Reeder corporation sold American real estate and related notes known as Desert Aire. Again, the loan and sale proceeds were used to pay off pre-existing liens on the properties used to secure the Resolute promissory note for the Diamond acquisition.

Resolute employed the services of respected regulatory counsel in Arizona, California, and Rhode Island throughout the acquisition process, as well as other law firms in California and Texas. July 10, 1995, at 12-14, 19-20, 108; CC551, CC358. In July 1998, however, counsel for Resolute informed petitioner that the earlier Diamond loan to Hilltop (which counsel had drafted and ostensibly negotiated a waiver upon) may have run afoul of Arizona regulatory limitations on loans to one borrower, and he recommended that it be restructured. July 11, 1995, at 120-21. The Windbrook loan (which had accrued interest) was then restructured in July 1988 with the original note being replaced with a combination of investments and the purchase of a Reeder property known as Florence Gardens. This restructured transaction was then disclosed both orally and in writing to Arizona regulators in August 1988 by counsel who represented to the regulators that the final

transaction complied fully with Arizona and California regulatory requirements. CC 675.

The prosecution contended that petitioner Christopher deceived the insurance regulators into believing that all of the collateral liens would be paid off prior to the acquisition closing, and that the regulator's approval of the acquisition was the product of this deception. Hence, the government argued successfully below that the insurance regulators had a property interest in the regulatory approval process such that petitioner's alleged deception deprived the regulators of that property interest.

Christopher contended below that neither he nor Resolute violated any applicable state insurance regulation or order, that every action taken by Resolute was undertaken in reliance upon the advice of competent regulatory counsel, and that the summer 1988 wire transfers at issue were based upon prior binding and secured loan agreements by Diamond or property purchases by American.[3] Mr. Christopher's status as President of Resolute lasted only 84 days during the summer of 1988, and he left Resolute's employ in early September 1988. The jury was presented with limited evidence that the two insurance companies went into receiverships for unspecified reasons, after Christopher's departure. The trial court precluded the defense from introducing any evidence as to the reasons, timing, or circumstances of these receiverships. July 10, 1995, at 161-63 (sustaining government objection to receivership evidence on ground that collateral to case). Thus, for example, the trial record contains no evidence that Resolute

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[3] The acquisition of American took place in a "conditional closing" on May 27, 1988 while the Diamond closing took place on June 14, 1988. The wire disbursements at issue in this case took place from June 15th through July 22nd.

failed to perform any contractual or other non-regulatory obligation it assumed during the acquisition process, or that any insurance company was financially harmed by their acquisition by Resolute and its substantial net capital contributions.[4] Christopher also contended, in a motion for a new trial, that his alleged misrepresentations to state insurance regulators did not state a wire fraud offense under this Court's holding in *McNally v. United States*, 483 U.S. 350 (1987) because the allegedly deceived party (the insurance regulators) did not, and could not, suffer any economic loss as a result of Christopher's alleged scheme to defraud them. Citing caselaw from a number of circuits, Christopher contended that the state insurance regulators had merely a regulatory interest in accurate information for purposes of the acquisition approval process--a matter as to which state law may speak--but which is insufficient, under *McNally*, to fulfill the necessary "property" objective of a federal scheme to defraud under the federal wire fraud statute, 18 U.S.C. § 1343. Second, Christopher asserted that, under *McNally*, there must be a convergence between the person deceived and the person potentially subject to economic injury, and that this requirement was not satisfied here because the allegedly deceived regulators were not potentially subject to economic injury. The District Court rejected both contentions.

Specifically, the District Court ruled that the property interest at issue in this fraud case was "formal state approval of a sale," and because of Christopher's deception "the insurance regulators were deprived of their right to effectively control the granting of approval and subsequent supervision." App. 30a, 32a. Further, the District Court held that the public had a

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[4] At sentencing, the government adduced evidence, which was credited by the District Court for purposes of calculating loss, that defendant Christopher's conduct caused the insolvency of Diamond.

protectible property interest in effective regulation such that, "when an insurance regulator is deceived, the public is effectively deprived of its right to that expected protection." App. 33a.

The District Court also refused to give a requested defense instruction on good faith reliance upon the advice of counsel. App. 40a. The trial record contained a plethora of evidence that Resolute retained the services of several law firms in California, Arizona, Texas, and Rhode Island for purposes of providing regulatory counsel during the acquisition process, and that Christopher received legal advice, including formal legal opinions, that the transactions at issue complied with all regulatory requirements. (CC480, 501, 507,557, 591, 675; July 10, 1995 testimony, at 119-21, 127.) Indeed, Christopher introduced evidence that the loan transactions with Diamond were restructured shortly after their funding at the recommendation of counsel solely in order to comply with Arizona insurance regulatory requirements on such loans, although the Indictment alleged that this restructuring was for fraudulent purposes. Redacted Indictment, ¶ 35. Moreover, the transactions themselves were documented by Resolute's lawyers, and Christopher introduced evidence that, in advance of each transaction, Christopher made full disclosure to counsel, and counsel opined that the transactions were in compliance with applicable regulatory requirements.

Upon appeal, the First Circuit affirmed Christopher's convictions. Noting that the issue of whether *McNally* requires convergence between the person deceived and the person injured is "an issue that has generated a split of authority," the First Circuit held that such convergence was unnecessary. App. 13a (comparing *United States v. Blumeyer*, 114 F.3d 758, 767-68 (8th Cir. 1997), *cert. denied*, 516 U.S. 1172 (1996) with *United States v. Lew*, 875 F.2d 219, 221-22 (9th Cir. 1989). On

appeal, the government asserted that it had established a property loss because the insurance regulators, by virtue of the approval statutes requiring approval for acquisitions, were "in essence statutorily-appointed agents for Diamond, American, and their policyholders." Government Brief, at 30. According to the government, the "defrauding of the regulators must therefore be considered a constructive defrauding of the companies and the policyholders themselves." *Id.* (citing *Blumeyer*). The First Circuit agreed, finding that Christopher was accused of "subverting requirements imposed by state insurance regulators designed to protect the financial health" of the insurance companies and that petitioners misrepresentations were directed at "funds the regulators sought to protect," thereby satisfying the property requirement for a mail fraud conviction. App.17a.

The First Circuit also affirmed the District Court's refusal to give an advice of counsel instruction on the broad ground that such an instruction is unnecessary because the District Court gave a jury instruction on intent. App. 19a. In so holding, the First Circuit ruled that a defendant is not entitled to an advice of counsel defense instruction in any case in which the jury is otherwise instructed that the defendant must "knowingly" commit an offense. App. 19a.

ARGUMENT

I. A substantial split of authority exists as to whether the federal fraud statutes are applicable to alleged fraudulent schemes to obtain regulatory approvals to conduct private businesses.

In the *McNally* case, this Court construed the scheme to defraud element of the mail fraud statute "as limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360, and this holding was reaffirmed by this Court in *Carpenter v.*

United States, 484 U.S. 19, 25 (1987). In the aftermath of *McNally*, federal courts have grappled with government contentions that the objects of alleged schemes to defraud constitute "property" within the meaning of *McNally*. In particular, many circuit courts have concluded that government approval to conduct a business "represents nothing more than an 'expression of the government's regulatory imprimatur.'" *United States v. Schotts*, 145 F.3d 1289, 1293 (11th Cir. 1998) (quoting *United States v. Schwartz*, 924 F.2d 410, 418 (2d Cir. 1991)). As a result, several circuits have concluded that "the government's regulatory interests are not protected by the mail fraud statute." *United States v. F.J. Vollner & Co.*, 1 F.3d 1511, 1521 (7th Cir. 1993). *Accord, Corcoran v. American Plan Co.*, 886 F.2d 16, 21-22 (2d Cir. 1989) (deception of state insurance regulators did not state mail fraud offense because policy holders did not have property interest in effective regulation of insurance company).

As the Eleventh Circuit recently observed in *United States v. Schotts*, 145 F.3d 1289 (11th Cir. 1998), while the majority of circuits have held that a business license is not property and therefore cannot support a mail fraud conviction,[5] some circuits

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[5] *Schott*, 145 F.3d at 1293 (citing the following as within majority of circuits holding that a business license is not property, *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991) (export license); *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990) (school bus driver permits) *cert. denied*, 500 U.S. 921 (1990); *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989) (taxi operator license); *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989) (pilot license); *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988) (bingo game license) *cert. denied*, 488 U.S. 924 (1988).

have held to the contrary,[6] and this "division among the circuits is not surprising because neither *McNally* nor *Carpenter* define the 'property protected by the mail fraud statute." 145 F.3d at 1293. Instead, this Court has informed lower courts that the term property should be interpreted broadly, but not broadly enough to include "intangible rights." *Schotts*, 145 F.3d at 1293 (quoting *McNally*, 483 U.S. at 356; *Carpenter*, 484 U.S. at 25).

This Court should grant review of this case to address the issue which has sharply divided the circuits since this Court's *McNally* opinion in 1987--does a governmental interest in regulating who may conduct a private business confer a property right upon the government which may be vindicated by a criminal prosecution under the mail or wire fraud statutes? Here, the only conceivable government property interest at stake was that of the state regulators to approve a private sale of an insurance company--that is, a purely regulatory interest unadorned by any financial interest of the state regulatory agencies. Further, the undeniable fact that governments, both state and federal, are increasingly in the business of regulating who may undertake or continue private businesses, virtually assures that this will be a recurring issue as to which uniform treatment by the federal courts is preferable.

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[6] *Schott*, 145 F.3d at 1293 (citing the following as within minority of circuits holding that a business license is property, *United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997) *rehearing denied*, 117 F.3d 1419, *cert. denied* 118 S. Ct. 441 (1997) (video poker license); *United States v. Bucuvalis*, 970 F.2d 937 (1st Cir. 1992) (liquor license) *cert. denied*, 507 U.S. 959 (1993); *United States v. Martinez*, 905 F.2d 7098 (3d Cir. 1990) (medical license) *cert. denied* 498 U.S. 1017 (1990)).

II. A split of circuit authority exists as to whether the federal fraud statutes apply to the alleged deception of those who cannot suffer economic injury, and this recurring issue warrants the review of this Court.

A number of federal courts have construed this Court's *McNally* opinion as logically requiring that the object of a scheme to defraud must be a target of both deception and financial injury, a limitation on mail or wire fraud prosecutions sometimes known as the convergence doctrine. *See, e.g. United States v. Lew*, 875 F.2d 219, 221-22 (9th Cir. 1989); *United States v. Shelton*, 848 F.2d 1485, 1495 (10th Cir. 1988), *cert. denied*, 469 U.S. 857 (1984); *Mylan Laboratories, Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1074 (D. Md. 1991); *Lifshultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1294 (D.S.C. 1992), *aff'd on other grounds*, 998 F.2d 1009 (4th Cir.), *cert. denied*, 510 U.S. 993 (1993).

The Sixth Circuit has recently noted that a split of circuit authority exists on this issue. *United States v. Frost*, 125 F.3d 346, 360 (6th Cir. 1997). In addition, the Second Circuit has expressed support for the convergence doctrine. *See, e.g. Corcoran v. American Plan Corp.*, 886 F.2d 16, 20 (2d Cir. 1989); *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988). Indeed, although the panel opinion below denied that the First Circuit had previously adopted the convergence doctrine, the language employed by the First Circuit in *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 794 (1st Cir. 1990), *cert. denied*, 498 U.S. 992 (1990), has been uniformly interpreted by other federal courts as a holding that, for mail fraud purposes, the person deceived must also be the person injured. *See, e.g., United States v. Blumeyer*, 114 F.3d 758, 767 (8th Cir. 1997), *cert. denied*, 516 U.S. 1172 (1996); *United States v. Sawyer*, 85 F.3d 713, 734 n.18 (1st Cir. 1996);

Byer Industries, Inc. v. Gulf Ins. Co., 888 F. Supp. 1, 2 (D.D.C. 1995).

Here, the First Circuit acknowledged in its opinion below that the circuit courts are split on the issue of necessary convergence, App 13a-14a. Indeed, a fair argument could be made that the First Circuit's position on this issue has changed from that of its earlier precedent in *McEvoy Travel*, at least as that case has been widely construed by other courts. *Sawyer*, 85 F.3d at 734 n.18 In the *Blumeyer* opinion, for example, the Eighth Circuit noted that "Whether a defendant may be convicted of mail fraud or wire fraud for making false representations only to a person other than the intended victims of the scheme is a difficult question, and one on which the case law does not admit of easy reconciliation." 114 F.3d at 767.

The facts of this case highlight the typical circumstance under which this issue will arise--a claim that false representations to a government official constitute a scheme to defraud when any economic loss could only be suffered by others, including those for whose economic benefit the government official acts as regulator. In substance, the government's position here is that every regulator, state or federal, has a property right in effective regulation based upon the expectations of the public in such regulation. An almost identical claim by insurance regulators was squarely rejected in *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989). In the *Corcoran* case, the New York Superintendent of Insurance claimed that the deceit of insurance regulators by former insurance executives of an insolvent insurance company satisfied *McNally's* requirement of a property right infringement because the policyholders had a property interest in dealing with an effectively regulated insurance company. 886 F.2d at 21. The Second Circuit rejected this contention, concluding that any such right of a policy holder to effective

regulation "is analogous to the 'intangible right of the citizenry to good government' which was repudiated by the Supreme Court in *McNally*." 886 F.2d at 22.

In *McNally*, this Court narrowly construed the mail fraud statute as limited to property rights in part out of a desire to avoid leaving "its outer boundaries ambiguous and involve[ ] the Federal Government in setting standards of disclosure and good government for local and state officials." 483 U.S. at 360. This comity concern is equally present in this context by dint of fact that Congress has expressly left the field of insurance regulation to the States by passage of the McClellan-Ferguson Act, 15 U.S.C. § 1012. The prospect that all disclosures, compelled or otherwise, to state regulatory officials will become the grist for federal mail or wire fraud prosecutions is one that fairly invokes this Court's cautionary note in *McNally* that "[i]f Congress desires to go further [than the protection of property rights], it must speak more clearly than it has." 383 U.S. at 360.

III. A split of circuit authority exists on the availability of an advice of counsel instruction, and this recurring issue warrants the review of this Court.

This Court has squarely held that, "As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). Petitioner Christopher introduced a host of evidence at trial, including formal legal opinion letters, correspondence, and counsel testimony, demonstrating that Christopher's action were undertaken in

reliance upon the advice of counsel.[7] Nonetheless, the District Court refused a request for a jury charge that good faith reliance upon the advice of counsel (App. 36a), and the First Circuit affirmed. In particular, the First Circuit held that such a good faith instruction is never necessary when the trial court gives an instruction that the government must prove that a defendant "knowingly" commits a wire fraud violation. App. 19a.

The issue of whether giving a general mens rea instruction precludes the giving of a requested defense instruction on good faith in a fraud case is one which has sharply divided federal circuit courts,[8] and which has previously prompted dissents from Justices White and Brennan from prior denials of certiorari. *United States v. Gross*, 506 U.S. 965 (1992) (White, J., dissenting); *Green v. United States*, 474 U.S. 925 (1985) (White, J., dissenting with Brennan, J., concurring). Here, the

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[7] The supporting evidence included formal legal opinions of different law firms to the effect that the closings complied with all state regulatory requirements (CC 435, 448), and letters by counsel to the relevant regulatory agencies (CC675), and testimony by corporate counsel that Resolute's actions complied with regulatory requirements. July 10, 1995, at 256, 259-60; CC675, at 2.

[8] *See generally* Jonas, *The Circuit Split Over Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegislation by the Courts or the Standards of Appellate Review*, 46 Syr. L. Rev. 61 (1995) (noting that the "federal courts of appeal are split over a question fundamental to the trial of any criminal fraud prosecution" and urging that "this question is one that the Supreme Court should resolve sooner than later"). *Compare United States v. Camuti*, 78 F.3d 738, 744 (1st Cir. 1996) (no good faith instruction when mens rea instruction given); *United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir 1990) (same); *United States v. Gross*, 961 F.2d 1097, 1101-03 (3d Cir.) (same), *cert denied*, 506 U.S. 965 (1992) *with United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir. 1985) (good faith instruction required); *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (same) (en banc).

specific good faith instruction requested by Petitioner--good faith reliance upon the advice of counsel--is a well recognized good faith defense. *See, e.g, United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Circuit 1997) (reversing mail fraud conviction for failure to give advice of counsel instruction) (citing cases); *United States v. Walters*, 913 F.2d 388 (7th Cir. 1990) (reversing mail fraud conviction for failure to give an advice of counsel instruction). *See* 1 Devitt & Blackmar, Federal Jury Practice and Instructions, § 19.08 (1992 ed.) The First Circuit's wholesale elimination of this defense charge raises an important issue which has divided the circuits both generally as to good faith instructions, and specifically as to the instruction of good faith reliance upon counsel.

The District Court declined to give an advice of counsel instruction based upon its perception that Christopher had failed to disclose to counsel "his intention to utilize the insurance companies' assets to pay off pre-existing liens." App. 36a. The record, however, reveals abundant evidence that Christopher timely disclosed this intention. Supporting evidence included the formal legal opinions of counsel tendered at closing wherein this intention was acknowledged, (CC 435, at 21), subsequent loan documents drafted by counsel and recorded in land records in which the purpose of the insurance company loans is identified as the payment of these existing loans (CC480, 501, 507, 557), prior correspondence by Christopher to counsel describing this as the purpose of the loans (CC 591), and correspondence amongst counsel themselves and to state regulators describing the structure and purpose of these transactions and how they complied with regulatory requirements. (CC 480, 675). The government, in its presentence report also acknowledged that Christopher informed counsel in advance that this was the intended purpose of the monies which were to disbursed and which would later become the subject of the wire fraud counts. PSI, at 6.

Finally, the defendant introduced the undisputed testimony of corporate counsel that counsel recommended the restructuring of the Windbrook loan based upon Arizona regulatory limits on loans to one borrower,[9] although the government would contend that this transaction was part of Christopher's alleged fraud. Redacted Indictment, ¶ 35.

On appeal, the First Circuit declined to address the substantial record evidence of Christopher's reliance upon the advice of counsel, although it expressed doubt about the likely success of such a defense. App. 19a. Instead, the First Circuit simply held that because the jury was given a proper instruction that a scheme to defraud must be undertaken "knowingly," that this charge adequately covered the defense of good faith reliance upon the advice of counsel. *Id.* In so holding, the First Circuit applied its prior precedent which had held that a general instruction on good faith is unnecessary when a sufficient instruction is given on the government's burden to prove a knowing violation of law. *Id.* (citing *United States v. Camuti*, 78 F.2d 738, 744 (1st Cir. 1996)). By this means, the First Circuit effectively eliminated a defendants' right to an advice of counsel instruction in any case in which the government's general burden on mens rea is charged.

It is well established in other circuits, however, that a defendant is entitled to an advice of counsel instruction as long as he satisfies the prerequisites for such an instruction.[10] *See*,

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[9] July 10, 1995 testimony, at 119-21, 127.

[10] "A defendant is entitled to advice-of-counsel instruction if he discloses evidence showing: (1) he made full disclosure of all material facts to his attorney before receiving the advice at issue; and (2) he relied in good faith on counsel's advice that his course of conduct was legal." *Defries*, 129 F.3d at 1308 (citing *United States v. Linde*, 18 F.3d 353, 356 (6th Cir. 1994)

e.g., *United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997) (reversing mail fraud conviction for failure to give advice of counsel instruction; citing *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988)); *United States v. Walters*, 913 F.2d 388, 391 (7th Cir. 1990) (same).

A defendant's need for an advice of counsel instruction is especially compelling in a case like this, where a complex business transaction is subject to the overlapping and conflicting requirements of three states in a heavily regulated arena. Given the small army of expert regulatory counsel deployed in this case for the purpose of assuring regulatory compliance, petitioner should have been afforded a jury instruction that these facts support his defense. As Chief Judge Bauer observed in the Seventh Circuit's opinion in *Walters* reversing a mail fraud conviction for failure to give an advice of counsel instruction: "Amid a sea of facts and inferences, instructions are the jury's only compass." *Walters*, 913 F.2d at 392. Accordingly, this Court should grant certiorari to clarify for the lower courts whether a general instruction of defendant's intent will preclude the giving of a defense instruction on the good faith reliance on the advice of counsel.

CONCLUSION

For the foregoing reasons, petitioner asks that the petition for a writ of certiorari to the First Circuit Court of Appeals be granted.

Respectfully submitted,

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